

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. **78-1237**

CROATAN BOOKS, INC.,

Petitioner,

-VS-

COMMONWEALTH OF VIRGINIA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF VIRGINIA**

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

CROATAN BOOKS, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled cases on November 13, 1978.

OPINIONS BELOW

The refusal of the petition for appeal by the Supreme Court of the Commonwealth of Virginia is unreported and is printed in Appendix A hereto, *infra*, page 1a. The entry of Judgment by the Circuit Court for Fairfax County, Virginia is unreported.

JURISDICTION

The Judgment of the Supreme Court of Virginia (appendix A, *infra*, page 1a) was entered on November 13, 1978. The jurisdiction of this Court is invoked under Title 28 Section 1257(3) of the United States Code.

QUESTIONS PRESENTED

1. In an obscenity prosecution, whether the trial court's refusal to instruct the jury that the community to be considered in determining contemporary community standards was nothing less than Fairfax County, Virginia, as a whole, violated Petitioner's First, Fifth and Fourteenth Amendment rights to freedom of speech, a fair trial and due process of law.

2. Whether the Petitioner was denied its First Amendment right to freedom of speech, his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process of law, when the trial judge refused to allow counsel for Petitioner to argue to the jury that the alleged obscene films were protected by the First Amendment to the United States Constitution.

3. Whether the Virginia Code Section which Petitioner was charged with violating, is unconstitutionally vague and overbroad and indefinite and whether the trial court's refusal to instruct the jury concerning the prurient appeal to members of the intended, probable recipient group, violated Petitioner's First Amendment right to freedom of speech and his Fifth Amend-

ment right to a fair trial and his Fourteenth Amendment right to due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America and the Code of the State of Virginia, Section 18.2 - 374(4).

STATEMENT OF THE CASE

At the Petitioner's trial by jury held in the Circuit Court for Fairfax County, Virginia, in Criminal Cases numbered 25594, 25595, 25596, 25605 and 25608, which were consolidated for trial, the Commonwealth of Virginia introduced, through the testimony of two Police Investigators, the five coin operated mechanical motion picture projectors and films, and coin boxes which had been seized, pursuant to a search warrant, from the Petitioner's adult bookstore in Fairfax County, Virginia, on August 11, 1977. Each of the motion picture films was shown to the Court and jury. Over the objection of the Petitioner (transcript pgs. 51-52, 61, 66-67), the testimony of a citizen of Fairfax County, who lived within five miles of the location of the Petitioner's bookstore, was introduced to establish the contemporary community standards of tolerance regarding sexually explicit motion pictures. The Petitioner, at the close of the Commonwealth's case (transcript pgs. 68-71), moved the trial Court to strike the evidence, and enter a judgment of acquittal, upon the ground that the alleged obscene films were protected by the First Amendment and upon the ground that the "expert" witness was not qualified and upon the ground that the Virginia Code is unconstitutionally vague and indefinite. The Motion to Strike was denied (transcript pgs. 71 and 77). The Petitioner thereafter introduced testimony of an expert witness on human sexuality, Doctor Lawrence Donner, who

was permitted to voice his opinion regarding lack of prurient appeal of the films, and their being tolerated as part of the contemporary community standards in Fairfax County (transcript pgs. 72-99). The trial Court denied the Petitioner's request for instructions that the relevant community for determining contemporary community standards of tolerance and/or acceptance of sexually explicit material in motion pictures should be nothing less than Fairfax County as a whole (transcript pgs. 110-119) and gave the Commonwealth's instruction (transcript pg. 123) which permitted the jury to consider a small subsection of the County as the relevant community. During final argument to the jury, the Court below refused to allow Petitioner's Counsel to argue that the alleged obscene films were protected by the First Amendment to the Constitution of the United States of America (transcript pgs. 143-144). Upon the jury's verdict of guilt in each case, the Court, having overruled the Petitioner's Motion to set aside the verdict and grant a new trial, imposed sentence. A Petition for Appeal to the Supreme Court of Virginia was timely filed, and was denied on November 13, 1978.

REASONS FOR GRANTING THIS WRIT

1. The Circuit Court for Fairfax County, Virginia, erred in denying the Petitioner's request to instruct the jury that the relevant community for determining contemporary community standards of tolerance and/or acceptance of sexually explicit material in motion pictures was nothing less than Fairfax County as a whole. The Court's instruction to the jury was subject to be interpreted that the relevant community was the immediate and local vicinity of the Petitioner's bookstore, where the alleged obscene films were presented (transcript pgs. 110-111, 123). This

ruling has been the subject of comment in three opinions of the Supreme Court of the United States of America, and at least one decision of the Supreme Court of Virginia, and is included in a Petition for Writ of Certiorari to the Supreme Court of Virginia previously filed with this Court by the Petitioner, Number 78-718, October Term, 1978. In the case of *Hamling vs. United States*, 418 US 87 (1974), 41 L.Ed.2d 590, a Federal prosecution in the State of California, which State has a "state-wide" contemporary community standards statute, held that it is not necessary to instruct upon a national community standard, but that *Miller vs. California*, 413 US 15, required only a "contemporary community standard". The case of *Jenkins vs. Georgia*, 418 US 153 (1974), 41 L.Ed.2d 642, held there was no constitutional requirement that juries be instructed in State obscenity cases to apply the standards of a hypothetical State-wide community, asserting that *Miller vs. California, supra*, approved but did not mandate, such an instruction, and that jurors may properly be instructed to apply "community standards" without a specification of the "community" by the trial Court. In the case of *Smith, DBA, Intrigue vs. United States*, 431 US 291, 52 L.Ed.2d 324, 334, another Federal prosecution, the Court, at footnote no. 6, in reviewing this problem, stated "the Court has never varied from the Roth position that the community as a whole should be the judge of obscenity, and not a small, atypical subset of the community. The only exception to this rule that has been recognized is for material aimed at a clearly defined deviant sexual group." This matter was the subject of an appeal to the Supreme Court of the State of Virginia in *Alexander vs. Commonwealth*, 212 Va. 554, 186 S.E.2d 43, which involved the contemporary community standard for the entire city of Portsmouth, Virginia, which was found to be constitutionally acceptable.

This Court remanded *Alexander vs. Commonwealth, supra*, for reconsideration in light of *Miller v. California, supra*.

2. The trial Court erred in refusing to allow Petitioner's Counsel to argue to the jury that the alleged obscene films were protected by the First Amendment to the Constitution of the United States of America, enforceable herein through the Fourteenth Amendment to the Constitution of the United States of America (transcript pgs. 143-144). This issue is also before this Court in a Petition for Writ of Certiorari to the Supreme Court of Virginia, previously filed by Petitioner, November 78-713. Since 1957, it has been established that the First Amendment to the Constitution of the United States of America protects all non-obscene speech and literary material. This includes motion picture films, *Roth vs. United States*, 354 US 476; *Jacobellis vs. Ohio*, 378 US 184; *Paris Adult Theater I vs. Slaton*, 413 US 49; *Jenkins vs. Georgia*, 418 US 153; *United States vs. Twelve 200 Foot Reels of Film*, 413 US 123. Prohibiting Petitioner's Counsel from utilizing this argument was a violation of the Petitioner's right to due process of law pursuant to the Fifth Amendment to the Constitution of the United States of America and denial of effective assistance of Counsel pursuant to the Sixth Amendment to the Constitution of the United States of America, as well as the denial of the Petitioner's First Amendment rights. Apparently the bench of the Circuit Court for Fairfax County, Virginia has adopted this ploy to deny the citizens the exercise of their First Amendment rights.

3. The trial Court erred in denying the Petitioner's Motion to Strike the evidence and to enter a judgment of acquittal, upon the ground that Virginia Code Section 18.2 -374(4) was unconstitutionally vague and indefinite (transcript pgs. 68-69, 71-71), and in denying the Petitioner's proposed instruction "E", which dealt with the

prurient interest appeal to members of the intended or probable recipient group. This was particularly significant in light of the nature of one of the films involved, "Junior Cadets". These materials must be tested by their appeal to the average person of the alleged probable intended recipient group, rather than their appeal to the average person in the community. *Mishkin vs. New York*, 383 US 502; *Pinkus vs. United States*, 436 US 293, 98 S.Ct. 1808; *Klaw vs. United States*, 350 Fed. 2d 155; *Paris Adult Theater I vs. Slaton*, 413 US 419, 37 L.Ed.2d 446, at 456 Note 6; *Smith DBA Intrigue vs. United States*, 52 L.Ed. 2d 324 at Note 6; and the trial Court thereby violated the Petitioner's rights preserved by the First Amendment to the Constitution of the United States of America.

CONCLUSION

The questions presented herein reoccur in obscenity prosecutions like echoes, and should be finally heard and determined by this Court. The area concerning the size of the "community" for determining contemporary community standards, which has been made ambiguous by three seemingly different statements contained in opinions of this Court has plagued the trial Courts and rendered the already dangerous field of free expression to be hazardous.

The now obvious attempt to deprive defendants in obscenity prosecutions of protection under the First Amendment to the Constitution by contending procedurally that the issue is not for jury consideration, commands consideration by this Court. Denial ignores rights preserved by three different Constitutional guarantees.

The reoccurring problem of different standards for homosexual materials demands settlement and the establishment of guidelines to prevent differentiation of our society into first and second and third class citizens.

For these reasons this Petition should be granted and a Writ of Certiorari issued to the Supreme Court of Virginia.

Respectfully submitted,

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Attorney for the Petitioner
CROATAN BOOKS, INC.

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 13th day of November, 1978.

Croatan Books, Inc., Appellant,

against Record No. 780791
Circuit Court Nos. 25594,
25595, 25596, 25605 and 25608

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: /s/ Richard R. Bunials
Deputy Clerk

APPENDIX B

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained

by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

[Amendment XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia

§ 18.2-374. Production, publication, sale, possession, etc., of obscene items.

— It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined

in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another. (Code 1950, § 18.1-228; 1960, c. 233; 1962, c. 289; 1970, c. 204; 1975, cc. 14, 15.)

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RESPONSE TO PETITION FOR
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To the Honorable, the Chief Justice
and Associate Justices of the Supreme Court
of the United States.

The Commonwealth of Virginia, the
Respondent, prays that the Petition for
Writ of Certiorari be denied.

ARGUMENT

Arguments will be presented to questions presented by the Petitioner in the same order which these questions appear in the Petition for Writ.

1. The Commonwealth submits that in obscenity prosecution, jury's can be properly instructed to apply "Community Standards" other question of obscenity without the particular community being specified. Jenkins v. Georgia, 418 U.S. 153 (1974)

2. The interpretation of Constitutional standards is not a function of a jury; in this case, the trial Court's proscribing argument to the jury concerning First Amendment protection of motion picture films was correct.

3. The Commonwealth submits that the Virginia Code Section of which the Petitioner was prosecuted is not unconstitutional. Price vs. Commonwealth, 214 Va. 490. Petition for Writ of Certiorari denied, 419 U.S. 902, 42 L.Ed.2d 148.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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